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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 501

HUGHES TOOL COMPANY,

Petitioner,

v.

TRANS WORLD AIRLINES, INC., THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER

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March 1, 1965

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The Joint Brief for Additional Defendants-Respondents distorts the issues presented by this case. The controlling issues are (1) whether the District Court could properly exercise jurisdiction over the conduct alleged in the counterclaims where (a) the dominant subject matter of the counterclaims is within the exclusive jurisdiction of the CAB, and (b) the District Court cannot grant complete and adequate relief prior to a CAB determination as to whether such conduct is in violation of the Federal Aviation Act and (2) assuming, *arguendo,* that the District Court could exercise jurisdiction, whether Toolco should have been permitted to suspend prosecution of its counterclaims pending CAB action.

I

The District Court could not properly exercise jurisdiction over the counterclaims pending CAB action

For the reasons stated in Toolco's Briefs in Case No. 443 and its Main Brief herein, the standards of the Federal Aviation Act have superseded those of the antitrust laws with respect to whether the acquisition and maintenance of control by a person engaged in a phase of aeronautics is in the public interest. The matter is central to the regulatory authority of the CAB.

The single course of conduct set forth in the counterclaims* is alleged to be in violation of the antitrust laws, the Federal Aviation Act and state law. The dominant subject matter of the counterclaims is the acquisition and maintenance of control by the additional defendants over TWA through the imposition and perpetuation of the Voting Trust. The acquisition itself is alleged to be a violation of

* The counterclaims allege a single course of conduct by the additional defendants in seizing control over TWA from Toolco and using and maintaining that control for their own purposes to the separate injury of Toolco and TWA. This seizure of control was made possible by and was the result of an unlawful agreement among the dominant suppliers of senior long-term financing to the major air carriers, an agreement and conspiracy to acquire control of TWA as a captive market for financing on terms advantageous to the lenders and a concerted refusal to lend money to Toolco or TWA so long as Toolco continued to control TWA. After the seizure of control the additional defendants embarked on a course of conduct calculated to perpetuate their control over TWA, to frustrate Toolco's contractual rights to terminate the Voting Trust, and to exercise control over TWA to obtain benefits for themselves at the expense of TWA and Toolco.

the antitrust laws. The principal injunctive relief sought is termination of the Voting Trust.

Additional defendants Equitable and Metropolitan, which have the power to name and remove at will the majority voting trustees and thus to control TWA,* are allegedly persons engaged in a phase of aeronautics within the meaning of the Federal Aviation Act. The Court of Appeals held, and the additional defendants admit (Joint Brief, p. 64), that the CAB has exclusive jurisdiction to determine whether the Federal Aviation Act has been violated. The additional defendants thus in effect also admit that if Metropolitan and Equitable are engaged in a phase of aeronautics, then whether the acquisition and maintenance of control over TWA through the Voting Trust is in the public interest under the standards of the Federal Aviation Act is a matter over which the CAB has exclusive jurisdiction.**

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* The Memorandum of the CAB (p. 4) admits the obvious fact, that the lending institutions control TWA's management. TWA's brief in case No. 443 states, however, that TWA is now run by "men of complete independence, of nationally-established stature, and without any personal stake in the controversy . . . [who] felt that the continued survival of TWA was a matter of national importance." (TWA Br. pp. 4-5) The way in which these gentlemen early attempted to assure "the continued survival of TWA" was to attempt to merge its enormous international operations into Pan American World Airways, Inc., an airline having three interlocking directors with one of the principal lenders. Moreover, it appears that one of the techniques chosen to ensure that this new management had no "personal stake in the controversy" was to give the president installed by the lender-management an employment contract which saddled TWA with the obligation of paying him $50,000 a year if the Voting Trust were to terminate.

** The contention that the CAB lacked jurisdiction over the central issue of the counterclaims because the additional defendants are not engaged in a phase of aeronautics is without merit. That matter, as the Court of Appeals recognized in holding that only the CAB had jurisdiction to determine whether the Act has been violated,

The additional defendants refuse to meet the supersession issue. Instead they claim that Toolco's arguments in No. 443 are not applicable because the CAB has never entered an order regulating the control relationship between the additional defendants and TWA. They in effect concede the force of Toolco's arguments in No. 443 and attempt to distinguish this case on the ground that here the CAB has not exempted their conduct from the operation of the antitrust laws.

The CAB's exclusive jurisdiction arises, however, from its power to approve or disapprove the control relationship established through the Voting Trust and not from the exercise of that jurisdiction. As established by *United States* v. *Cunard S.S. Co.*, 284 U.S. 474 (1943) and *Far East Conference* v. *United States*, 342 U.S. 570 (1952), even though the administrative agency has not passed upon the conduct over which it has jurisdiction the matter is one for exclusive determination by the administrative agency where the standards of the regulatory act have superseded those of the antitrust laws.

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was clearly one which only the CAB could determine. And here the Bureau of Enforcement of the CAB has found that there is reason to believe that Equitable, Metropolitan and Irving are engaged in a phase of aeronautics, not because lending money to an air carrier is itself a "phase of aeronautics" but because these additional defendants through the use of negative covenants in loan instruments and through other activities have enmeshed themselves in matters relating to the operation of the airlines which clearly constitutes being engaged in a phase of aeronautics.

Nor does the contention that the District Court has jurisdiction because only certain of the additional defendants are engaged in a phase of aeronautics have merit. That Equitable and Metropolitan and Irving have been assisted by others in the allegedly unlawful acquisition and maintenance of control is certainly not grounds for ousting the CAB of jurisdiction to determine the validity of the Voting Trust or for conferring jurisdiction upon the District Court over a matter within the exclusive jurisdiction of the CAB.

The principle of supersession is applicable even though a determination approving the challenged conduct under the regulatory act might not be upheld by a reviewing court. See *Federal Maritime Board* v. *Isbrandtsen Co.*, 356 U.S. 481, 497-499 (1958). Accordingly, the contention of the additional defendants that Toolco was attempting to establish a defense for them is nonsense.

Moreover, the supersession principle is applicable even though all of the challenged conduct may not have been entrusted to the exclusive jurisdiction of the agency. It is for the agency to determine matters which come within its jurisdiction before the courts entertain an action of which those matters are a dominant part. As stated in the opinion of the three-judge District Court in *Luckenbach S.S. Co.* v. *United States*, 179 F. Supp. 605 (D. Del. 1959), which was in material part affirmed by this Court, 364 U.S. 280 (1960):

> "' . . . The recent decisional law, in conjunction with the legal literature strongly urges where an administrative board, particularly knowledgeable in a specialized area, has been established, preliminary resort to the body should be had *if some phase of the matter in litigation is within its exclusive jurisdiction.*
>
> "' . . . The requirement of preliminary resort to administrative boards is imperative to achieve maximum effectiveness from our judicial process. To bypass an agency peculiarly adapted in a particular field would be a complete economic and judicial waste. An integrated system necessitates that agency action precede court review where machinery has been created for this procedure.

> Especially is this true in the area of national transportation and other fully regulated industries." (179 F.Supp. at 611; emphasis supplied).

If the CAB were to find the Voting Trust lawful under the standards of the Act and the District Court were to find that it violated the antitrust laws, the collision of regimes interdicted by *Pan American World Airways, Inc.* v. *United States,* 371 U.S. 296 (1963) (*"Panagra"*), would occur. Therefore, the District Court lacked jurisdiction to entertain Toolco's counterclaims until after the CAB had found that the acquisition and maintenance of control violated the Act.

* * * *

The additional defendants asserted as a defense to the counterclaims that the CAB has approved the Voting Trust, a position reiterated in their Joint Brief.* That the CAB did not approve the Voting Trust and only approved certain transactions between Toolco and TWA is made clear, however, by the Memorandum of the CAB (p. 22, n. 13). But CAB approval of the Voting Trust would mean not only that the Federal Aviation Act had not been violated but, by reason of Section 414, that the acquisition of control through the Voting Trust could not be attacked under the antitrust laws. Since the additional defendants concede that only the CAB may determine

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* Although the defense of approval was asserted to the violation of the Federal Aviation Act alleged, Toolco was placed on notice that the additional defendants were contending that the CAB had approved their acquisition of control through the Voting Trust. Certainly the additional defendants were not precluded from raising this issue because it was pleaded as a defense to another counterclaim and they could offer the order of the CAB in an attempt to defeat the antitrust claim at a trial of the counterclaims.

whether the Federal Aviation Act has been violated, it is exclusively for the CAB to determine whether it has approved or will approve the Voting Trust.

* * * * *

Since Toolco was not in a position to obtain a termination of the Voting Trust until after the CAB had acted, Toolco could not obtain the principal equitable relief which it sought until after a determination by the CAB that the acquisition and maintenance of control over TWA by the additional defendants were not in the public interest. It was also not in a position to obtain damages or other relief for the violation of the Federal Aviation Act which it had alleged until after a CAB determination. For the District Court to exercise jurisdiction over any portion of the counterclaims until it could properly exercise jurisdiction over all the conduct alleged would have been to deprive Toolco of the complete and adequate relief it was entitled to obtain in a single action.

II

Toolco should have been permitted to suspend prosecution of its counterclaims

Whether Toolco had the right to suspend prosecution of its counterclaims because of its position that a prior CAB determination was a condition precedent to obtaining complete and adequate relief should be considered in the following context:

(a) Counterclaims were filed on February 12, 1962. Replies, containing a defense of CAB approval of the Voting Trust, were filed by some

additional defendants on January 25, 1963, almost a year after the counterclaims were filed, but all replies were not filed until February 11, 1963. On February 1, 1963, seven days after the first replies were received, Toolco advised the District Court and the additional defendants that a complaint was being prepared for filing with the CAB. (See f. 27885-86).

(b) On February 6, 1963, Toolco filed with the CAB, and served on the additional defendants, a Complaint and Request for Investigation which set out the dominant facts alleged in Toolco's counterclaims, and asserted that the CAB had "exclusive primary jurisdiction" over the conduct set forth therein. (See AA 145, AA 160).

(c) The Bureau of Enforcement of the CAB, after reviewing the Complaint filed by Toolco and the various defenses asserted by the additional defendants, concluded that an investigation under the Act should be instituted because

> ". . . there are reasonable grounds to believe that certain provisions of the Act and requirements thereunder have been violated, and that a formal investigation of the alleged violations by the Board is in the public interest. These allegations, as previously noted, are substantially similar to the issues raised in the District Court . . . ." (Docket 14314, Petition for Enforcement, p. 3, April 8, 1963)

This matter is now pending before the CAB.

(d) At the same time that Toolco filed the Complaint with the CAB, that is, twelve days after the first replies were received, Toolco filed its

CAB complaint in the District Court and moved to suspend prosecution of its counterclaims.

The additional defendants have avoided addressing themselves to the issue whether they would suffer *legal prejudice** if Toolco were permitted to suspend the litigation of its counterclaims pending CAB action. The additional defendants have not claimed that legal prejudice would result if the counterclaims were dismissed without prejudice. Rather, the additional defendants claim that Toolco should not be permitted to suspend prosecution because they were required to engage in expensive discovery.** Consid-

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* Legal prejudice occurs when the action "has proceeded so far that the defendant is in a position to demand on the pleadings an opportunity to seek *affirmative relief*, and he would be prejudiced by being remitted to a second action." *In re Skinner & Eddy Corp.*, 265 U.S. 86, 93-94 (1924) (emphasis supplied); see also *Jones* v. *SEC*, 298 U.S. 1, 20 (1935); *Young* v. *Southern Pac. Co.*, 25 F.2d 630, 631 (2d Cir. 1928); *City of Detroit* v. *Detroit City Ry.*, 55 Fed. 569, 572 (E.D. Mich. 1893).

** The additional defendants claim that they were burdened by reason of:

(a) the requirement that they produce documents; however, as more fully appears at pages 17, 19, 61-62 of the Opening Brief that requirement was totally unrelated to the pendency of the counterclaims; the fact that a number of documents produced by the additional defendants were marked as exhibits in TWA's deposition confirms that documentary production from the additional defendants related to the complaint;

(b) their attendance at depositions; however, the assertion of the additional defendants that they did not gratuitously assume the burden of attending depositions ignores that the Special Master expressly stated "I do not purport to rule on [this question] at the present time." (ff. 7305-06);

(c) the requirement that the additional defendants share the cost of the Special Master's fee; however, that was expressly subject to reallocation (B-29); and

(d) the length of time consumed by Toolco in discovery; however (i) the Special Master consistently found that Toolco had been diligent and expeditious in the conduct of its discov-

ering that the counterclaims were not at issue during the entire period of time Toolco was conducting discovery and that discovery was confined to the complaint, the assertion of the additional defendants that they were burdened by being required to engage in discovery is plainly false. However, even assuming that the additional defendants had sustained expense as a result of the pendency of the counterclaims, nevertheless that does not constitute legal prejudice, and the incurring of expenses is relevant only to a determination of the proper "terms and conditions" to be imposed on the non-suit. Rule 41(a)(2); *Cf. United States* v. *E. I. duPont de Nemours & Co.*, 13 F.R.D. 490 (N.D. Ill. 1953).

It being clear that no legal prejudice would result from permitting Toolco to suspend prosecution, the additional defendants have attempted to becloud the issue by arguing that (a) the position of Toolco that a CAB determination is a condition precedent to obtaining complete and adequate relief is obviously spurious since it amounts to the assertion by Toolco of a defense on behalf of the additional defendants which they had not themselves raised; (b) Toolco took

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ery notwithstanding the period of time which had elapsed (*e.g.*, A-166), and (ii) the Special Master found that through the end of the Tillinghast deposition—which had consumed by far the longest portion of discovery—the plaintiff TWA had not advised Toolco of the ultimate facts upon which it was relying to support the conclusory charges of antitrust violations contained in its notice-pleading complaint (see A-162-63). The fact that Tillinghast had been president of TWA for only a short period of time prior to the filing of the complaint does not, as the Joint Brief seeks to imply, indicate that Toolco should not have conducted an intensive inquiry of him, since having authorized the filing of the complaint, Tillinghast presumably was informed of the factual basis therefor. That his information might be hearsay is no objection to obtaining such facts on deposition.

the position only after it had subjected the additional defendants to discovery and solely for the purpose of avoiding a full disclosure of the facts; and (c) this Court should not consider whether or not a non-suit was appropriate because Toolco failed to request a non-suit *in haec verba*.

These arguments are as erroneous as they are irrelevant. The facts are that:

1. The additional defendants themselves asserted CAB approval of the Voting Trust as a defense and it was only after replies containing the defense were received and after this Court's decision in *Panagra* that Toolco filed its complaint with the CAB and moved to suspend prosecution in the District Court;

2. The Bureau of Enforcement of the CAB has found that there are reasonable grounds to believe the additional defendants have violated the Act;

3. It is not disputed that Toolco could not obtain complete relief from the District Court since the additional defendants agree that the District Court could not adjudicate whether the Act has been violated; accordingly, not until after a CAB determination could Toolco obtain damages or other judicial relief on account of such violation;

4. There is, at the least, a substantial question as to the jurisdiction of the District Court;

5. A hearing before the CAB would require Toolco to disclose the facts fully as much as a hearing in court since the facts before the CAB are identical with the facts in the counterclaims:

6. The additional defendants were subjected to no discovery on the counterclaims;

7. Toolco was not seeking to foreclose the additional defendants from obtaining relevant information; Toolco produced an enormous amount of relevant documentary material to the additional defendants and they copied over 125,000 documents;*

8. The additional defendants could not have been prejudiced by Toolco's failure to request a non-suit *in haec verba* since all parties were informed of the nature of the relief Toolco was seeking, *i.e.*, cessation of prosecution of its counterclaims, and of the grounds—"exclusive primary jurisdiction" of the CAB—upon which Toolco was seeking relief; and

9. As more fully appears at note 1, pages 53-54 of the Opening Brief, Toolco was given no opportunity to request a non-suit.

Under these circumstances Toolco should have been

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* The charge of the additional defendants that Toolco was withholding tax information which would establish that Toolco in its control over TWA obtained tax benefits at the expense of TWA must be considered in light of the fact that Toolco exercised control over TWA from 1939-1960 and that from Deember 31, 1960 to date the additional defendants have controlled TWA. Toolco produced all of its tax returns and related material for the period 1939-1960. What the additional defendants complain of not having received are tax returns for 1961-1962. Such tax returns are plainly irrelevant to the claimed defense, even if it be assumed that Toolco's tax motivation is a defense.

The privileged documents the additional defendants claim Toolco wrongfully withheld were in fact delivered to the District Judge by Toolco. Toolco's position was that no waiver of the privilege had theretofore occurred, and that if Toolco produced the documents, a waiver would then occur and thereby moot for judicial review the question whether a waiver had previously taken place.

permitted to suspend prosecution. Toolco submits that it was improper to dismiss with prejudice a meritorious claim involving hundreds of millions of dollars, in the absence of a hearing on the merits, when the burden, if any, sustained by reason of the pendency of the action, consists of no more than the incurrence of expense in connection with discovery.

* * * *

In a final flight of fancy, the additional defendants urge that notwithstanding their bitter opposition to Toolco's motion to suspend prosecution, the dismissal with prejudice is justifiable under Rule 41(b) as a failure to prosecute because Toolco suspended prosecution. In an attempt to support the argument they cite this Court's decision in *Link* v. *Wabash R.R.*, 370 U.S. 626 (1962). That case is totally inapposite.

In *Link* plaintiff was seeking to continue to prosecute a six-year old negligence complaint which had been the subject of many motions, an appeal, and much pretrial discovery, while at the same time refusing to comply with court orders designed to assure the efficient administration of his claim. This Court held that in order to preserve the authority of the District Court to regulate its business, to prevent undue interference with its processes, and to avoid the burden of keeping stale claims on its calendar, that the complaint might be dismissed with prejudice for failure to prosecute.

Here, Toolco was not seeking to continue to prosecute at all. On the contrary, at the time the District Court declared it would dismiss the claim with prejudice, which was twelve days after replies were filed, Toolco was seeking to suspend prosecution when no

pretrial proceedings other than production of documents by Toolco had been had with respect to the claim. Under these circumstances, no sanctions for failure to prosecute could properly be applied.

* * * *

Even assuming, as additional defendants urge, that Toolco's conduct justified the imposition of sanctions under Rule 37, nevertheless the dismissal with prejudice was improper. The underlying principle in the application of sanctions is that where the issue involves only an adjustment of rights between opposing parties—clearly the case when discovery is involved—the sanction imposed must be remedial, not punitive. *Hovey* v. *Elliot*, 167 U.S. 409 (1897). However, a dismissal with prejudice for failure to make discovery cannot be deemed remedial unless the circumstances are such that the court is justified in applying a presumption that the failure to make discovery is tantamount to an admission of a want of merit in the claim. *Hammond Packing Co.* v. *Arkansas*, 212 U.S. 322 (1908); *Societe Internationale* v. *Rogers*, 357 U.S. 197, 210 (1958). Here, Toolco's suspension of prosecution as a result of its position that a CAB determination was a condition precedent to its obtaining complete and adequate relief on its claim, cannot permit an adverse presumption to be raised against Toolco. Accordingly, the dismissal with prejudice was improper.

Conclusion

For the reasons stated in this reply brief and in Toolco's main brief, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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